Supreme Court, U.S.
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No. 85-406
IN THE
SUPREME COURT OF THE
UNITED STATES
October Term, 1985

GEORGE R. ARIYOSHI, GOVERNOR,
STATE OF HAWAII, et al.,
Petitioners,

v.

SELWYN A. ROBINSON, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT OLOKELE SUGAR COMPANY, LIMITED IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether answers by a state court to certified questions posed by a federal Court of Appeals are dispositive as to matters subject to the federal court's jurisdiction, when the federal court disagrees with the answers given.

GEORGE R. ARIYOSHI, GOVERNOR,
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The United States of America having filed a brief as amicus curiae, pursuant to Supreme Court Rule 22, respondent Olokele Sugar Company, Limited begs leave to respond as follows.

The views of the Solicitor General certainly are entitled to respect.

So are those of the Court of Appeals for the Ninth Circuit and the United States District Court for the District of Hawaii. Where the Solicitor General has apparently reviewed a cold

record, with emphasis on the certified answers given by the Hawaii Supreme Court, the district court had the benefit of a full trial. The Ninth Circuit had the benefit of several briefings and arguments, and was able to examine in depth matters which are assumed by the Solicitor General.

At the heart of the Solicitor General's submission is an assumption that the Hawaii Supreme Court's answers "in the form of a published opinion rendered . . . must be regarded as dispositive . . . ." Solicitor General's brief at 13.

We disagree. The Hawaii Supreme Court's conclusions are entitled to weight. However, federal courts, when presented with matters within their jurisdiction, have the right and the obligation to determine the facts and law as they see it. The Ninth Circuit was not bound to rubber-stamp statements of the Hawaii Supreme Court. Yet the Solicitor General is unwilling to peer through the veil presented by the answers to the certified questions.

Except for ripeness, the Solicitor General does not question that the claims presented to the federal district court and the Ninth Circuit were within the jurisdiction of those courts. Federal questions certainly were raised.

The Solicitor General accepts without question the Hawaii Supreme Court's assertion that further proceedings in state court in McBryde would be held. Yet the Hawaii Supreme Court in

McBryde ordered no remand. Since 1973 no proceedings whatsoever took place in any state court.

Even if further proceedings were conceivable in state court, the federal courts had every reason to act as they did below.

The Solicitor General is confused as to who is entitled to benefit from the res judicata effects of Territory v. Gay. As found by the district court, Olokele is the privy of a party in Territory v. Gay. Robinson v. Ariyoshi, 441 F.Supp. 559, 575 (D. Haw. 1977), A. 85, aff'd, 753 F.2d 1468 (9th Cir. 1985). As lessee of G & R (or the Robinsons as they are now known), Olokele also has a right to all res judicata benefits of Territory v. Gay.

Contrary to the intimations of the Solicitor General, the present case is not one in which Olokele is claiming only that it relied upon general case law in constructing diversion works. Olokele relied upon an on-point judicial determination concerning the same watercourse.

Whatever the confusion the Solicitor General may see in Hawaii water law, there was nothing unclear about the holding in Territory v. Gay.

The Ninth Circuit entered its own judgment in Territory v. Gay. When, in 1973 and 1974, questions arose concerning the continued effectiveness of Territory v. Gay, the federal district court and the Ninth Circuit had every reason to effectuate the prior decree.

If the Hawaii Supreme Court is entitled to interpret its own decision in McBryde, the federal courts are not impotent to effectuate the Ninth Circuit's judgment in Territory v. Gay.

In its certified answers, the Hawaii Supreme Court made it clear that in any further proceedings in McBryde, the rulings in McBryde would be dispositive under the rubric of law of the case or whatever. This means that Olokele will no longer have the water rights that it had under Territory v. Gay. Olokele's ability to improve its plantation for its future benefit will be jeopardized. Its ability to resell its water rights will be obliterated. Olokele's water rights would be subject to continuing exercises of discretion by state courts as to whether "illegal" uses of water should be enjoined.

Yet, under the decree of the Ninth Circuit in Territory v. Gay, Olokele had a right to use the normal surplus waters of the Hanapepe River. Those rights, protected by a federal decree, would be dashed if the federal court could not effectuate its own ruling but was required to tender to state courts the vitality of the Ninth Circuit's decree.

We can assume that the state court, in further proceedings in McBryde, might rule that Olokele could continue its "illegal" water usage. Olokele still has a right to a declaratory judgment in federal court that its water usage was not in fact "illegal" but was protected by a Ninth Circuit decree.

The Solicitor General accepts at face value the Hawaii court's assertion that McBryde was not final. That very issue was briefed and considered by the Ninth Circuit. With the benefit of extensive argument, the Ninth Circuit evidently perceived that the state court's answers to the certified questions were nothing more than a deliberate effort to evade federal jurisdiction. An attorney for the petitioners could hardly have done a better job in crafting answers to frustrate federal jurisdiction. Indeed, the certified answers were the product of Chief Justice Richardson, who appeared as an amicus in the Ninth Circuit through his own attorney. Having been an amicus in the Ninth Circuit, Judge Richardson declined to recuse himself from responding to the certified answers.

While the state court's answers are entitled to respect, we submit that they are not dispositive. The Ninth Circuit was duty bound to find the facts as the evidence compelled. Both the district court and the Ninth Circuit saw finality in McBryde. With two courts having so determined, this Court should be loathe to reverse that determination.

Respectfully submitted,

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